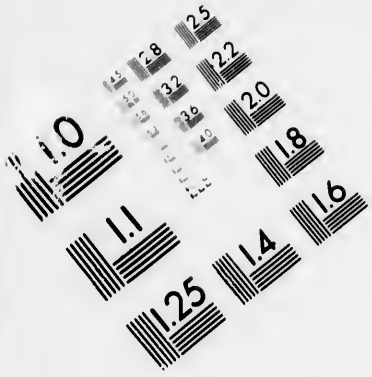

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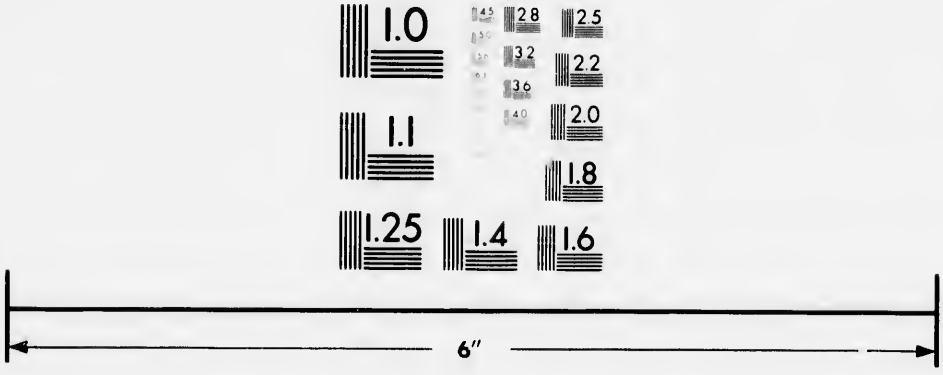

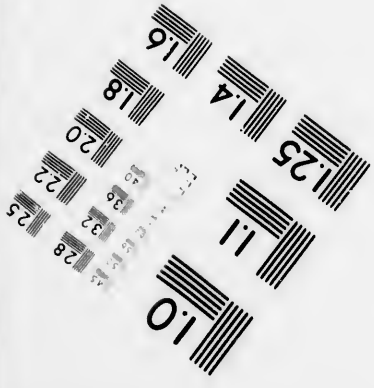

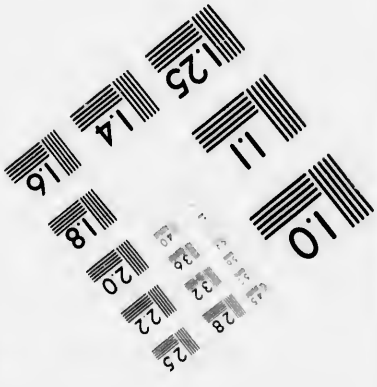

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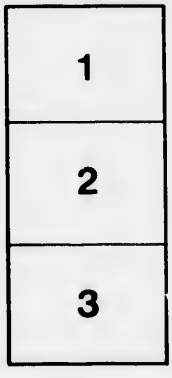

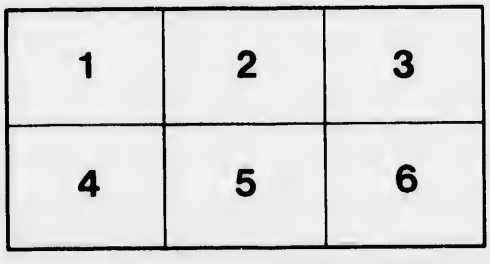

INT

12.

PRIVATE

INTERNATIONAL LAW

(WESTLAKE DIGESTED)

BY

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TORONTO:
THE GOODWIN COMPANY, 79 VICTORIA STREET.
1899.

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PREFACE.

The imperfect arrangement of the contents of *Westlake's* erudite treatise on *Private International Law*, combined with the anterior information on the subject which that work necessarily postulates, renders almost indispensable some aid to the student who through the medium of *Westlake*, first essays the task, of mastering this most difficult department of Jurisprudence. The present compilation, which includes a statement of the most modern Canadian authorities on the subject, is the first publication with that design in view. The extremely condensed statement of the law, while it cannot compensate for, must in some degree excuse, the absence from the following pages, of a literary finish, which, it cannot but be regretted, is so consistently absent from all modern expositions of legal thought.

OSGOODE HALL, TORONTO, January 18, 1899.

INTRODUCTION.

Private International Law is the department of National Law which arises because there exist different territorial Jurisdictions having different laws.

Human laws are distinguished from Laws of Nature, thus:—The former are always uniform. The latter are not.

International Law is not law, because it is enforced and imposed by no sovereign authority. It arises from the Comity of Nations.

The great feature of Natural Law is that it is a code of rules to be uniformly applied,—the breach whereof is regularly punished by an authority irresistible to the subject. If it can be broken with impunity it is no law.

Law and Usage differ thus:—Breach of law is punished; breach of usage is not.

Usage resembles International Law, thus:—Breach is not punished in either case. Still the International Rules are called "Law."

Law is divided thus:

Law { Human Laws { National Law
Natural Laws { International Law { Public.
Private.

PRIVATE

INTERNATIONAL LAW.

CHAPTER I.

Characteristics of Private International Law.

Private International Law is administered by National Courts, and generally only to subjects of the Nation where the Court is situated. Questions of Private International Law may arise in any action.

What law shall be applied ?—is the great question Private International Law is constantly required to decide.

(a) As to Court (*Forum.*)

Grounds determining a National Jurisdiction where action lies, are—

(1) that subject matter,—if a (*a*) thing, is situate
if a (*b*) contract, was made
or if a (*c*) delict or tort, was done
in the country where the action is brought.

In these, the tribunals, respectively, are known as :—

(*a*) *forum situs*, or *forum rei sitae.*

(*b*) *forum contractus.*

(*c*) *forum delicti.*

Here the subject matter of the suit is the great point.

(2) That all claims relating to a matter should be adjudicated on together, *i.e. forum concursus*, *e.g.*, bankruptcy, insolvency, or administration ; or—

(3) that defendant is personally subject to the Court, *i.e. forum rei.*

This subjection of defendant is either by (*a*) domicile, or (*b*) nationality.

In Rome, the *forum rei* implied a bond between judge and defendant, *e.g.*, both were Romans. In England no bond is required. It is enough if defendant is in the jurisdiction, and can there be served. Then England has jurisdiction.

(b) As to Law (*Lex.*)

The action being maintainable, what law is to be applied? This is a question of *lex* or law. There are four kinds of law:

1. *Lex loci rei sitae*, or *lex situs*, *i.e.*, law of place where thing is situated.

2. *Lex loci contractus*, *i.e.* law of place where contract was made.

3. *Lex loci delicti*, *i.e.*, law of place where tort committed.

4. *Lex concursus*, *i.e.*, law of place where the proceedings are being conducted.

Lex loci actus, applies to execution of instruments, *e.g.*, will in France before one witness, in Ontario two are required.

Lex fori is the last law which is always waiting, seeking invocation. This is the Court's own law.

Such are the questions of Private International Law, and the *forums* and laws which are competing.

CHAPTER II.

History of Private International Law.

It came into England through Ecclesiastical and Admiralty Courts, from the Continent. There the statute theory prevailed. Three kinds of statutes existed:

1. Statutes Real, governing things. They were applied as *lex situs*. They were strictly applied as to realty—but not so strictly as to personalty.

2. Statutes Personal, governing persons. They were applied as *lex domicilii*. They appeared in questions as to status and capacity.

3. Statutes Mixed, were where neither real nor personal questions arose, and such questions might be decided by *lex contractus, actus*, or *fori*.

These statutes were applied in other jurisdictions, and the theory or system was that in force on the Continent by which a way was found to decide questions arising between small states.

This system was only partly brought into England.

The Statutes Real theory was, being in harmony with English system, *i.e.*, having *lex situs* decide as to

realty. In other words, in England the *lex situs* was chosen in preference to *lex actus* or *contractus*.

The Statutes Personal were not brought into England; the theory being, find defendant in England and serve him, and there is jurisdiction. *Lex loci actus* (*e.g.*, notaries to draw deeds) was not accepted in England. In 1861, however, Lord Kingsdown's Act as to wills being allowed in England if in accord with *lex loci actus* was passed.

There was no Private International Law in Rome. Aliens were discouraged residing there. But later on, many aliens entered Roman soil. What law should govern strangers? *The Praetor* collected rules of several states subject to Rome, and applied them to the aliens—This was *Jus Gentium*. But later still Emperor Caracalla made all Rome's inhabitants Roman citizens, and *Jus Gentium* fell out of use.

By barbarian conquests new laws came in; then Roman Empire broke up, and when its parts were separated, the people found some Private International Laws requisite in their international dealings.

Holland says Private International Law is a body of rules regulating the proper law for application,—*i.e.* a body of rules for finding rules.

There are two doctrines as to the origin of Private International Law.

1. THEORETICAL,—(Westlake and Savigny and Phillimore favour this) is not founded on natural justice, but on the principle that there exists a common law for a commonwealth of States.

2. POSITIVE,—(Story, Holland and Dicey favour this) that Private International Law forms part of the municipal law of any land. It has its rules like law of contracts, and these rules are part of English law. Otherwise grave injustice would be done.

CHAPTER III.

General Observations.

The Canadian Provinces are as separate as to matters within their own jurisdictions as any independent States.

Private International Law governs cases, *e.g.* in Ontario, having a foreign element in them.

What laws govern when there is the foreign element?

Three questions must be answered before this one can be answered.

1. Is case one which Ontario Court can by Ontario law entertain?

This is question of jurisdiction or *forum*; If answer is "Yes," then,

2. What body of law is to be applied? This is question of law or *lex*.

Then when foreign judgment is to be enforced, one more question is to be answered—

3. Is the case one which by Ontario law the foreign Courts moved can hear?

Ontario Court must decide these three points first, and it can decide to apply a foreign law.

"Law of England" means either—

(1) Every rule enforced by English Courts; including (*a*) those deciding the limits of jurisdiction and choice of laws.

(2) Every rule excluding (*a*.)

If Ontario Courts decide that foreign laws govern,—they withdraw Ontario local laws and apply the foreign local laws.

Formerly jurisdiction depended on service within the realm, for there was no law allowing service of writ out of jurisdiction. *Forum* was *forum rei.*

Question of venue often ousted jurisdiction. Suit on Tort or Contract could be brought in any country. But in land actions,—*e.g.*, trespass to land—venue had to be laid in country where land was situated. If land was in France, no venue could be laid in England, hence venue ousted jurisdiction.

This is changed by Judicature Acts, defendant out of the jurisdiction can be served.

If writ was served in England objection that defendant was a foreigner would not prevail, as long as remedy could be enforced,—this was done by personal jurisdiction English courts exercised over defendants. It acted *In Personam*, hence could foreclose foreign

lands, for this is a personal equity. Penn v. Lord Baltimore, 2 Wh. & Tu. 1047.

English Court will not order a sale of foreign lands. Strange v. Radford, 15 O.R., 145.

English Court can't try action for trespass to foreign lands, nor title thereto. Mocambique v. Brit. S. Africa Co., '92, 2 Q.B., 358; reversed by 93 A.C. (H.L.) 602.

English Court won't decide right to possession, nor try action for damages for trespass thereto, nor action for negligence as to foreign lands. See Brereton v. C.P.R., 29 O.R., 57.

English Court will hear action as to land in foreign country.

(1) If there is a contract between parties as to land (*e.g.* will enforce specific performance.)

(2) If there is an equity between the parties.

Tort committed abroad can't be sued on in Ontario, because the Judicature Act makes no provision for service of writ abroad in such cases. But if defendant can be served within the jurisdiction, the action lies.

The foreign element in any suit may concern:

1. Parties to suit.
2. Subject matter.
3. Act in question.
4. Procedure.

1. PARTIES TO SUIT.—

Foreign element may arise out of — Status, which comprises — { Nationality. Domicile. Capacity. Legitimacy.

Status is the relation between a person and the law of his society, and the other members of that society.

Nationality is the relation between a person and the sovereign state to which he owes allegiance.

Nationality is acquired by (1) birth, or (2) acquisition.

Domicile is person's relation to a certain state, which relation arises from residence in its limits as a member of its community. This decides personal law governing him and his moveables.

Capacity is actual legal power to act as a free, sane adult,—it becomes important principally when absent, —*e.g.* infancy, lunacy, etc.

Legitimacy is a quasi-element, affects only person's relation to others.

CHAPTER IV.

Westlake's Chapter XV.—Nationality.

Nationality is important because there is growing up in Europe a tendency to substitute it for domicile.

A double status arises for all at birth.

1. POLITICAL,—making one a subject of his country.

2. CIVIL—by which one has rights, etc., municipally.

Two theories as to deciding Nationality :—

1. Descent.—*Jus Sanguinis*—favored in Rome.

2. Birth.—*Jus Soli*, favored in England and United States.

In Rome, son of a *Civis Romanus* was a Roman citizen, wherever born. This theory is growing. Several states may claim one's allegiance at once.

AT COMMON LAW.

RULE.—By Common Law of England, Nationality came only by birth, and persons born within British control became British no matter what nationality parents had, and no one not so born could be a Britisher.

Two Exceptions :—1. Children of foreign ambassa-

dors born in England don't become Britishers, (by "Privilege of Exterritoriality.")

2. When hostile army occupied part of England—it ceased to be English soil for some Private International Law purposes.

Foreigners there born remained foreign; English children there born remained English.

By Statute.

Statutes were—25 Edward III., statute 2.; 7 Anne c. 5, s. 3.; 4 George II. c. 21, s. 1.; 13 George III. c. 21.; Effect of these Acts was to make anyone born out of England, a natural born British subject, if his *father* or *grandfather* had been such, and had not taken foreign oath of allegiance.

Nationality is not inherited through a woman, and a married woman takes her husband's nationality; *i.e.*, English woman marrying a French man becomes French.

Note.—The status acquired by these Acts was personal and not transmissible,—but it is now transmissible by R.S.C. c. 113.

Nationality is acquired by Naturalization or Denization.

In England, Act of 1870, (R.S.C. c. 113.) alters alien's position.

Alien could lease land for only 21 years, for residence or business, and could not inherit or transmit estate.

S. 3. Now, he can own land, and inherit and transmit,—but is not eligible to office or franchise. He can't own British ship, but can be mortgagee thereof, Comstock v. Harris, 13 O.R. 407. Frenchman buying English ship—it becomes French, and is forfeited if it flies a British flag.

Alien must be naturalized to get full British rights.

Alien, once naturalized, on returning to his home, loses for the time his rights acquired by naturalization, (unless treaties to contrary,) *i.e.* England cannot protect him (when he is away) as if he were a Britisher.

Before Acts of 1870—person naturalized could not enter Parliament, now he can, but one who has been denizened cannot.

Denization—is inferior kind of Naturalization by Letters Patent. Person denizened becomes as a new man. His powers date only from them, and are not retrospective as in naturalization. Therefore, denizen can't inherit land nor transmit it to children born before denization.

Advantage of Denization—No residence is need-needed as condition precedent,—(generally used for consuls, etc.)

Under Imperial Act, 1870—person's naturalization

is only as to United Kingdom. If he came to Canada he would be an alien.

Naturalization in a colony does not extend by recognition to the Empire. But this is in doubt, held in 1865 it does, and 1890 it does not.

Act of 1870 gives right to citizens to forsake their British nationality. Before this the doctrine of double nationality prevailed. It was, in 1870, changed in two ways. One can now become an alien if he wishes.

1. STATUTORY ALIENS.—Two classes of Britishers can cease allegiance by making declaration of alienage.

(1.) Any one born in Empire, who is Britisher naturally, but by birth became a foreigner and is still so.

E.g., sons of Frenchmen born in England.

(2.) Any one born out of Empire, of British father.

Any one except infant, lunatic or married woman, can make this declaration; so can an alien naturalized (if there is a treaty.)

By s. 6 of Naturalization Act (1870), a change is made, and now any Britisher voluntarily becoming naturalized in foreign state, loses his British nationality while there, and holds only one. *Re* Trufort, 36 Ch. D. 600.

Westlake s. 292. One entitled to two nationalities, who files no declaration—*e.g.* son of Britisher abroad, —may be an alien by his acts. He is still a Britisher

for purpose of transmitting nationality (British) to children. If he make the declaration he cannot.

S. 10 of English Act (26 of R.S.C., c. 113.) Children of naturalized subjects, who during infancy reside with parents in United Kingdom are naturalized Britishers.

What if child born in Spain—and never resided in United Kingdom ?

If his father was Britisher, he is; if father only naturalized, he is not, even though born after naturalization, because father has only powers of a Britisher. If father naturalized, and while child is yet an infant, he comes to United Kingdom, child is Britisher then. (Same rules govern as to Canada.)

Transfer of Nationality.

Rule.—Allegiance to *e.g.* England ends by cession. (France gives Minorca to Egypt. Minorcans become Egyptians.) Generally time is given by treaty to decide. Minorcan must leave the island and go to a French place, *e.g.* a French colony, at once, if no time given, to remain French. Calvin's case (2 Rul. C. 575.)

Allegiance is due to sovereign in person.

CHAPTER V.

Westlake's Chap. XIV.—Domicile.

In Rome everyone could be sued in his domicile for all personal matters, and nowhere else for such matters, except in special forum of matter (*e.g.* case of tort—where committed.) *i.e. forum speciale obligationis* (or where he belonged by citizenship, he being there personally.)

Under Roman law one can have various domiciles at once. This in Rome was important, as to municipal duties.

Domicile (in status) is more important than nationality. It is what decides the personal law on which majority, succession, testacy, etc., depend. It was unknown in England formerly,—(old law was, serve defendant in England.)

Domicile is not residence. It differs from residence in that, one is a member of his domicile's *civil* society.

Domicile is not allegiance, for one's foreign domicile is consistent with English allegiance. *Re* Grove, 40 Ch. D. 216.

Though one's domicile is often his permanent abode, it is not synonomous with "abode." One's domicle

may be where he has no home, and he may live where he has no domicile. Best opinion is he may have many homes, but only one domicile. Residence usually subjects one to domicile there.

P. 322 of Westlake—Trade domicile in case of war, —belongs to Public International Law.

There are three kinds of domicile.

1. *Naturale,—i.e.* by birth.

2. *Necessarium,—i.e.* by operation of law.

3. *Voluntarium,—i.e.* by choice,—where one is abandoned and another chosen.

1. NATURALE—(*a*) Father's domicile at birth of child governs child's,

(1) If child born when he's alive.

(2) A legitimated child—takes father's domicile at time of legitimation (if child is then a minor.)

(*b*) Mother's domicile at birth of child governs child's,

(1) If father then dead.

(2) If child illegitimate.

(3) It father unknown.

(*c*) Child of unknown parents,—or foundling,—domicile is where child is found. Legitimation can't be performed in England—only in Scotland, etc.

2. NECESSARIUM applies to wives and minors.

(1) Wife always takes husband's domicile. Dwell-

ing elsewhere won't alter, nor even raise a presumption contrary. Neither Separation *de facto*, nor deed of separation can change it. Judicial separation can alter it. Wife keeps husband's domicile after his death,—second marriage gives her second husband's domicile.

(2) Infant can't by his own act change his domicile for new domicile can't be got until he is of age. His domicile follows his father—unless illegitimate and not legitimated, it is not every place that a child can be legitimated when it follows the mother.

Last domicile of infant's parent which remains with him—is his domicile of origin.

(I.) Generally—Guardian can't change ward's domicile unless contra in (1) appointment, or (2) law of place where he's appointed.

(II.) If mother is guardian—and nothing contra in deed, or law of place where she's appointed, infant's domicile follows mother, if change is (1) *bona fide*, and (2) not for the mother's sole benefit. *Re* Beaumont (1893) 3 Chy. 490.

(I.) Lunatic who was never sane, is like an Infant, and his domicile follows all changes of domicile of his father until he becomes sane.

(II.) Lunatic who became so after attaining 21,—

his domicile can't change with committee, but remains what it was when he was sane.

Westlake, s. 254, Englishman going to France and domiciled there except he has not French required authority, and therefore cannot in French estimation be deemed a domiciled Frenchman;—English law will treat him as to his moveables as if he were, because he did all English law asks to equal change of domicile.

3. VOLUNTARIUM, or of choice. Voluntary choosing is the feature of this. If this domicile ends, that of origin always arises. Origin domicile may end by act of law,—sentence of death (not life exile.)

Domicile of choice is formed by residing in new land (not that of origin) intending to reside there an indefinite time, therefore forced residence abroad (*e.g.* by life exile) does not make new domicile. *Re* Orleans, 1 S. & T., 253.

Prisoner's flight to avoid arrest does not make new domicile, because there's no choice. Kersteman v. McClelland, 10 P.R., 122.

One may end one's domicile of choice without taking new one; but domicile of origin returns. *e.g.*, Leaving country with intent to change domicile, and dying on the way, his domicile of origin returns,—see below.

What constitutes Domicile? Moorehouse v. Lord,

10 H. L. C., 272. Held required to become merged in with people of the country,—*i.e.* to abandon his patriotism. Udny v. Udny, L.R., 1 H.L. (Sc. Ap.) 441, reversed this.

Patria = Political status.

Domicilium = Civil status.

There need not be an intent to make new place home to constitute a domicile of choice. Domicile flows from residence,—intent is not material, nor is his knowledge that it will change his domicile.

Domicile is inferred from many circumstances.

e.g. 1. Residence of man's wife and family.

2. Merchant's townhouse.

3. Where one exercises political functions.

4. Length and continuity of residence.

5. Being naturalized in a new land.

6. Buying partnership.

7. Where property is directed to be invested.

Intent in these cases may be material.

Merchant's town house is more important than his country house, but contra as to countryman's.

Domicile of choice may be acquired or abandoned. The person must leave one land intending to go to another.

I. Westlake says in going from domicile of origin to that of choice—change occurs on actual arrival,—if

death occurs on the way, domicile is that of origin, but on change from one domicile of choice to another of choice,—if he intend to acquire the new one,—and die on the way, domicile is the new one. This is wrong. In both cases domicile is that of origin.

II. A leaves Canada for Mexico, intending to return after a long (uncertain) time. The intent is useless. He gets Mexican domicile, if he arrives—if not, he keeps Canadian. Doucet v. Geoghegan, L. R., 9 Ch. D. 441.

III. A change of residence for health's sake,—intent to return when health is restored. This is a certain time. He retains old domicile.

IV. A change of residence for health's sake,—knows he'll die there—He retains first or old domicile. Because here he's forced to go, and root idea of this kind of domicile is choice, therefore there's no choice. Hoskins v. Matthews, 8 DeG.M. & J. 13.

V. Abandoning domicile of choice without intending to create a new one,—*e.g.* leaving Canada and going travelling. Domicile of origin attaches.

British domicile is not changed by accepting foreign service under British Crown, except in India. If question of domicile depends on intent, declarations are good evidence. McMullen v. Wadsworth, 14 A.C. 631.

CHAPTER VI.

Westlake's Chapter XII.—Contracts.

Rights in Private International Law *not* affected by domicile are—

a-d. Those relating to contracts (except marriage) torts, procedure and immovables, (realty.)

All questions as to realty, and forms of conveyance are governed by *lex situs*, questions of capacity are settled by law of domicile.

Therefore descent is governed by *lex situs*, yet "Is X. capable of being heir?" is governed by law of claimant's domicile.

England accepts this, except in one point—if child can be legitimated by law of his domicile, England calls him legitimate, only he can't inherit English land. "His status as heir" is decided solely by English Law. In all other points he is governed by *lex situs.*

(*a*) Rights as to contract.—

I. FORMAL VALIDITY—*e.g.*, seal, etc., is governed by law of the place where contract is made, *lex loci contractus celebrationis*, (*lex loci.*)

Foreign writers say he can comply with this (*lex situs*) or *lex domicilii*. English Law says it must comply with *lex actus* only.

II. CONTRACT'S SUBSTANCE is governed by parties' intent. If performance is to be in another land,—presumed that law governs.—If parties have any country other than that where made, in view, that country's law will govern. If intent is expressed, such expression governs. Hamlyn v. Talisker, (1894) A.C. 202,—where agreement made in England as to contract to be performed in England,—express agreement that Scotch law should govern,—held Scotch law governed.

III. PROCEDURE.—This is often very closely allied to solemnities or formalities of contract. *E.g.*, Statute of Frauds. Law is:—If particular kind of evidence is needed in *lex fori*, that kind of evidence must be complied with. (Indirectly this affects formality). *Lex loci* may reject evidence which *lex fori* would accept.

In France, receipt unstamped was inadmissible—it is admissable in England—not to show contract, but the fact of payment,—it is question of procedure, not formality. Bristow v. Sequeville, 5 Ex. 275.

Contract illegal by law of place where made is bad in England; so also any contract to violate English Law. Contract conflicting with English moral or

public interests is void in England, though valid where made.

Contract to serve (as servant) refers to where hirer lives and not to where service is to be done.

Lawyer's right to sue depends on law affecting his bar, and not where he's retained. So also as to doctor.

Unknown principal's right to sue on contract of agent with third party, depends on law of agent's and third party's domicile.

CHAPTER VII.

Westlake's Chapter XI.—Torts.

(*b*) Torts are not affected by domicile, but by—

1. Law of place where tort committed, and
2. Law of place where suit brought.

These two must concur.

Tort must therefore be to be sued on in England—

(1) A wrong where committed, and

(2) A wrong by the law of England. The Halley (Liverpool v. Benham) L.R. 2 P. C. 193.

Proof of foreign law is a fact on which existence of the right to damages depends.

Some one skilled in foreign law must prove it. He need not be a lawyer, but must have more than an academic knowledge of the law.

English Courts won't interpret a foreign statute,—they will ask foreign lawyer to testify as to its legal effect;—*i.e.*, to say what are the decisions on it. It is presumed foreign and English law agree. *Re* O'Brien, 3 O.R. 326; Langdon v. Robertson, 13 O.R. 497.

What if foreign lawyers differ? Ontario Courts

will read foreign Act and decide itself. Rice v. Gunn, 4 O.R. 579.

Where act is wrong where done but no suit—law of place where wrongdoer lives governs. If act is a wrong, but no civil suit lies in land where done, —if it is a tort in England, can suit lie in England? No. If act is wrong—a tort where done, but civil action lies only after criminal action,—suit for tort lies in England without taking the criminal proceedings in the foreign land.

If wrong was done where there's no law—*e.g.* North Pole,—there's no *lex loci delicti*, but there are—

1. *Lex Fori.*
2. Law of victim's domicile, and
3. Law of aggressor's domicile.

The last of these governs.

Where act is not a wrong where done *e.g.*—N. Pole.

Westlake says last of above governs.

But England gives no action if law of aggressor's domicile either, (1) indemnifies, or (2) shields wrongdoer, or (3) extinguishes remedy. Even if no action of that kind in place where committed, then, unless the tort is authorized or innocent or excusable where committed, England gives no remedy. Machado v. Fontes, (1897) 2 Q.B. 231—Brazil libel—no action

there because not recognized—yet action in England lay.

If two English ships meet at sea,—English law governs.

Rule of Road at Sea.—Statutes govern.

If English and Russian ships meet at sea,—old rule prevails.

Collisions at Sea.—If captain is in charge—there's no difficulty.

If pilot is in charge, there is a difficulty.

If pilot causes negligence,—what law governs?

It is only if by law of pilot's land pilot controls captain,—owners of ship are free. *Lex actus* measures damages in tort. Put plaintiff in same position as if payment made at right time and place.

CHAPTER VIII.

Westlake's Chapter XVIII.—Procedure.

(*c*) Procedure is not affected by law of domicile, but by law of place where suit is begun,—*lex fori.*, *i.e. lex fori* governs as far as it can be separated from the material questions in issue.

(*d*) Immovables—see Chapter XII. on Immovables.

CHAPTER IX.

Parts of Westlake's Chapter II.—Status, Penal Laws.

(*a*) STATUS.

The Law of Domicile *does* affect the following:

1. Status or Personal Capacity.
2. Marriage.
3. Divorce.
4. Laws *re* Moveables.

(*a*) Domicile governing status renders domicile an element of status,—often the domicile decides status. *E.g.*, in France, majority is 24. One living in France, and only 22, is of infancy status.

What law—if case is in English Court—decides status?

RULE:—If transaction occurred in land where party whose status is questioned was domiciled the *lex domicilii* governs such person's status.

Contract made in Norway,—there majority is 25,—defendant residing in England was sued in England, (he was domiciled in Norway)—defendant was 24.

Held an infant. Here the *lex loci contractus* and *lex loci domicilii* are the same in fact.

What if these two laws are not the same? *E.g.*, if act done in England? Such act is not affected by any foreign status, if it is (1) Alien to England, or (2) Penal,—*e.g.*, the relationship of master and slave are alien to England; so also polygamy.—These are not recognized in England.

(*b*) PENAL LAWS.

A Penal Status is one imposed on person to deprive him of rights or to punish him.

Foreign Penal Status is not recognized in England, —*e.g.*, status *re* religion, marriage. But the *effect* of the foreign Penal Status—England will recognize as existing as a fact in the foreign land.

What kind of Penal Laws will England enforce?

England seems to favor holding a law not penal (in Private International Law.)

Officer signed false certificate—by New York Acts, he is liable for all debts while with Co'y. Plaintiff (an informer) sued for $100,000. *Fi. fa.* issued and sued on here in Ontario. Contended this was Penal Law. Held Not. Huntingdon v. Attrill (1893), A.C., 150.

A proceeding is not penal which results to benefit of individual, and England will enforce it. England won't enforce if it benefits the state.

Penal Status consequent on a foreign crime,—*e.g.* outlawry,—England won't recognize.

Transactions occurring in land where one has no domicile. What law governs? Fact that status is given to one by law of his domicile,—other Courts should recognize. As to the *effect* of that status—they can use their discretion.

E.g., A is an infant at 23 in France. England realizes that as a fact, but will use its own law to decide consequences of this Infancy Status. *E.g.*, also as to legitimation. England recognizes it (as a fact) in Scotland, but its effect, making children legitimate, England won't recognize far enough to allow of inheritance of English land.

Contracts entered into and to be performed in foreign land where defendant is domiciled,—English Court adopts foreign law to say if party was an infant.

If contract made and to be performed in England,—defendant is domiciled in Holland;

Is he an infant? Holland law decides (as to fact.)

Is he liable? English law governs (as to effect.)

E.g., if for necessaries—contract made by infant, as decided by Holland law, (*i.e.* 24 years.)

He is liable,—but effect in Holland is that he's not liable. English effect governs.

Same principle governs law Parent and Child,—effect is decided by English law.

D. is French,—travels IN ENGLAND—while THERE he does an act { wrong by French law. / right by English law. } He is free.

If what he did was { right by French law / wrong by English law. } it is wrong,— *e.g.* murder.

I.e., everyone must observe England's criminal laws while in England.

Thus we see status and capacity are separate.

Now consider *act done in France*,—DOMICILE IN SPAIN,—SUED ON IN ENGLAND. Rule is:—

Law of domicile governs as to both existence and effect of status.

Illustration that fact and effect of status are governed by law of domicile, when act and domicile are out of England;

Father domiciled in Scotland—parents reside, child born, and marriage occurs in England,—legitimation is good,—for it is governed by law of father's domicile.

Note well,—(1) This domicile of father must exist at birth of illegitimate child.

(2) Father at time of marriage must be domiciled in a land allowing legitimation.

(3) This is the law even though illegitimate child follows its mother's domicile.

N.B.—Child thus legitimated,—born in foreign land is not British subject, even though its father was a natural born one, (were he born properly he would be.) In this particular legitimation does not relate back to birth—also as to inheriting English realty.

CHAPTER X.

Westlake's Chapter III.—Foreign Guardians.

Foreign infant or lunatic being in England, English Court can appoint a committee, even though one exists in his land.

Two theories on this :—

1. Foreign guardian has no power in England.

2. Must be misconduct in foreign guardian to justify interference.

Better opinion is :—England will appoint only when it cannot avoid so doing.

British infant abroad—if even only British by Stat. (*i.e.* born abroad—a child of English subject) and out of jurisdiction English Court can appoint guardian, —even if he has no property within jurisdiction.

If guardian appointed by Court of infant's domicile —guardian can sue in England for personalty of the infant in England.—So also as to lunatic.

If there's money in Court,—Court can hand it over, —generally Court will. Hanrahan v. Hanrahan, 19 O.R., 396.

Court can in its discretion treat foreign infant as its ward.

CHAPTER XI.

Westlake's Chapter IV.—Marriage and Divorce.

(1) MARRIAGE.

This is the only contract needing a ceremony.

Its validity depends on

1. Parties, capacity and status.

2. Formalities.

I. How is capacity decided? Westlake says by law of domicile and *lex actus*.

Dicey says, former only.

It is doubtful, but *lex domicilii* is necessary anyway. (Perhaps wife's is enough.)

Parties domiciled in England,—marry in France,—they are such relatives that they can't marry in England, but can in France,—is not good. If they intended to live out of England it is good.

II. Forms must comply with *lex loci actus*.

Except. 1. Exterritoriality—*e.g.*, marriage on ship,—or British man-of-war.

2. British Army—abroad,—soldiers, etc., may marry by British law.

3. Ambassador's house—both contracting parties should be subjects of his country. "His house is his native land." Can apply law of his native land.

4. Where impossible to observe local forms, because,

(1) No form there.

(2) No form recognized in civilized lands.

(3) No form morally proper.

If marriage is good in domicile—it is good in England unless it is against English policy.

Religious vow — preventing marriage—England repudiates—unless it makes marriage *ab initio* invalid—England then recognizes it.

Form and capacity, or status—

Consent—*e.g.* of guardians in domicile—if dispensable there, then question is of *forum in loci celebrationis.*

Consent—*e.g.* of guardians—if indispensable in domicile, then question is of status in *loci celebrationis.*

Absence of consent,—if question of status, invalidates; not so if question of forum.

When will form not be required to be satisfactory to *lex loci actus*? When it is (not DIFFICULT, but) IMPOSSIBLE,—then law of domicile governs.—*E.g.* at Rome, only priests can celebrate marriage. Protestant marriage held good if marriage is by Methodist.

If *lex loci actus* allows polygamy, is such a marriage to one only good?—

No, because it is conditional. Test is:—One man marrying one woman.

RULES.—(1) If one can marry indiscriminately—it is worthless.

(2) If one can't marry till present one dies—it is good.

Difference between forms and essentials are—former impede—latter prohibit.

RULE.—Everything goes to form in *lex loci celebrationis*, but unconditional prohibition.

Penal incapacities are not recognized in England if such penal incapacities have no being in England.

Marriage with dead wife's sister is called incest in England—and is bad; but in Ontario it is no offence, it is good.

Ecclesiastical Court in England before 1857 (date of Matrimonial Causes Act) had jurisdiction in—

(1) Suit of Jactitation of Marriage—where one not married claimed he was.

(2) Suit to declare null a marriage.

(3) Suit for divorce *a mensa et thoro*—for judicial separation.

(4) Suit for restitution of conjugal rights.

To dissolve marriage—lay with Parliament—not

any court, until 1857,—the Divorce Court was established, and it can grant divorces.

What law governs as to divorce? This is a great question.

Three Theories of Divorce.—

I. Marriage is mere CONTRACT,—divorce a discharge thereof, and *lex loci contractus* governs. Result is that England could alone dissolve English marriages, and no others. Once it was thought in England that this was a valid theory. But it is not.

II. PENAL DOCTRINE.—Divorce is punishment for criminal offence,—and law of land where offence is committed and that of domicile governed. This theory is Scottish.

III. STATUS DOCTRINE.—Marriage is a status,—DOMICILE of husband is the place where action lies, and law is *lex domicilii*. Le Mesurier v. Le Mesurier (1895) A.C. 517.

Two ways to make English marriage—

(1) Celebrate it in England.

(2) Celebrate it according to law of place where celebrated.

Alimony—is a subsidiary question.

Mere residence gives jurisdiction for everything but divorce.

When will foreign divorce be good in England?

(1) When it is good by foreign law—need not be for cause English Courts would recognize.

(2) But if foreign Court applies a disability—*e.g.* that parties are not to marry for four years—England won't recognize it.

(3) If foreign divorce is conditional on parties staying separate—held England will recognize this condition.

(4) Submitted—husband must be domiciled in jurisdiction of Court granting divorce. Green v. Green (1893) P. 57.

Parties' domicile is that of husband.

But it is open whether or not wife can take new domicile after she is divorced, and also if she can when her husband has deserted her.

Submitted, and this is now law :—

RULE.—If husband were domiciled in England—and deserts her—she can sue in England; but if husband has acquired a new domicile he is not amenable to new domicile acquired by wife (if she can acquire one.)

When is divorce not in effect required to be by Court of husband's domicile ?

RULE.—When husband is divorced by Court not of his domicile, and he marries elsewhere, and at place

he's married the divorce is deemed good—his children are legitimate.

Wife divorced—re-marries—divorce invalid,—she can't get new domicile,—and even marriage in new land is invalid.

Canadian law won't allow as good, a foreign divorce from a Canadian marriage.

This conflicts with Courts.

Desertion alone is no ground for divorce.

English marriage is one in England or one where husband is domiciled in England, and which is celebrated anywhere.

CHAPTER XII.

Westlake's Chapter VIII.—Immovables.

Immovables are Realty and Chattels real.

Title to realty passes by law of sovereign having the eminent domain.

Lex situs governs—but owner being within other Courts' jurisdiction may indirectly give that Court jurisdiction. Strange v. Radford, 15 O. R. 145. Penn v. Lord Baltimore, 2 Wh. & Tu. 1047.

Foreclosure of foreign land lies—must be a personal equity. English Court won't hear suit involving title to foreign land—not even land in Ireland. Burns v. Davidson, 21 O.R. 547. [England won't do anything for Ireland, not even give it Home Rule.]

Equity must be enforceable in a practical way. Equity must arise from contract or trust.

If equity is not recognized positively by *lex situs*—English courts won't enforce it. Not, however, until equity is fully (1) repugnant to or (2) excluded by *lex situs*—will England refuse to enforce it. If equity merely has no existence in *lex situs*—England will enforce it. Waterhouse v. Stansfield, 21 L. J. Ch. 881.

Contracts for sale of foreign lands will be specifically performed.

Fraud as to specific land is not entertainable.

Lex rei sitae says what immovables are,—easements etc., are such for P. I. Law purposes,—may be personalty for other purposes.

Law of limitation—is governed by *lex situs*.

Limitation—is where remedy is barred—procedure.

Prescription—is where property's title passes—substance.

Title can pass only by *lex situs*. Form of suit is governed by *lex fori*, and so this law governs litigation of title.

If it is deemed a Law of Prescription taking away and passing to another the title—the *lex situs* governs —if law of limitation, *lex fori* governs (though on this latter writers differ.)

One of age by *lex situs* so as to give deed can give a deed though not of age by the *lex actus*. Adams v. Clutterbuck, 10 Q. B. D. 403.

Agreement giving right to shoot over land in Scotland—no seal—none required in Scotland—made in England—held valid—*lex situs* governed.

Succession of Immovables. Forms of *lex situs* must be complied with; but a will not conforming with *lex situs* as to form,—and therefore invalid to

pass realty—may pass personalty,—and put heir to *election*—thereby operating on realty.

Capacity of Testator—*lex situs* governs as to land, also effect of will on land, and also construction of will, also as to validity of an imposed restraint.

Lex situs was eagerly seized on in England as to Realty.

Lex situs won't validate a security on land (*e.g.*, mortgage) or a contract which is void by *lex loci contractus*.

Mortmain Act restrains disposition of English land though charitable purpose is to be executed abroad. Opinions differ on this.

CHAPTER XIII.

Westlake's Chapter VII.—Movables.

Is a thing movable?—*Lex situs* decides. Held in Jamaica slaves were part of the land, because *lex situs* so declared. *Ex parte* Rucker, 3 D. & C. Bankr., 704.

If a thing is held by above test to be a movable, then it has in P. I. law no location for it follows person of owner, and *lex domicilii* governs.

Exception:—Solitary Chattels are governed by *lex situs*, but if one's entire movables are in question—*e.g.*, devolution of them, general assignment, etc., then *lex domicilii* governs. But one getting good title to a thing where the thing is situated takes a good title everywhere. Cammell v. Sewell, 5 H. and N. 727; Minna Craig v. Ch. Bk. Ind. (1897) 1 Q. B. 55, and 460.

"*In rem*"—the thing is bound, not the parties.

Judgment of foreign court—not good in England if that foreign court declined to notice a title properly acquired in England. But if it were merely that English law was misinterpreted, England would recognize a foreign decision based on this misinterpretation, because the person who lost in the foreign

court should have appealed. The preceding sentence is as to a repudiation entirely of English law, and not ignoring of it.

RULE is:—Foreign Judgment *in rem* is invalid (possibly) if court giving judgment gives no recognition to law of other lands as is required by P. I. Law.

General Assignment of movables occurs in three ways.

1. Marriage.
2. Bankruptcy.
3. Death.

} All governed by *lex domicilii.*

MARRIAGE.—Westlake p. 65-74.

Two cases.—1. Where there is no marriage settlement.

2. Where there is.

1. Where none.—Effect of marriage on both parties' movables is decided by husband's *(a)* actual or *(b)* intended domicile at time of marriage.

When were goods got?—Moveables got before change of domicile are not affected. If got after change of domicile—governed by law of matrimonial domicile—*i.e.*, where they eventually intend to settle.

2. Where settlement exists.—Parties' rights are governed by the settlement. The settlement's validity is governed by *lex loci contractus*. Parties' capacities are governed by the law of their domiciles, and if

nothing contra, the law of husband's domicile will govern (1) operation, and (2) effect of the settlement, and (3) interpretation of contract (settlement). Change of domicile does not affect these points.

"Interpretation" = meaning of words used. This is always a question of fact.

"Construction" = meaning of contract after meaning of words is found. It is a question of law.

Interpretation is governed by (1) *lex loci contractus*, unless performance to be in other land, when it is governed by (2) law of the place of performance.

S. 211.—To understand foreign settlement one must: (1) Translate settlement, (2) interpret technical words, (3) give evidence of foreign law applicable to it, (4) give evidence of peculiar rules governing it, (5) then construe. Succession is controlled by last domicile of deceased.

CHAPTER XIV.

Westlake's Chapter VI.—Bankruptcy.

English Court may go on with bankruptcy proceedings even though such are proceeding in a foreign land,—if for benefit of creditors.

Company domiciled in England or existing because of English incorporation may be wound up there, even if its ramifications are international.

Company domiciled out of England may be wound up in England if it has an office there, but can't be dissolved. It can't be touched if there's no English office. Debtor to English bankrupt paying debt by foreign legal process is freed. 1883 Act of England *re* Bankruptcy applied to debtor domiciled in England at time of, or one year before presenting petition.

All goods, realty etc., vest in trustee, no matter where property is, except property situate in foreign lands, but including colonial property. Domiciled British creditor going abroad and getting and bringing to England property of debtor must put it in hotchpot. Thus England acts indirectly on foreign goods. So also if foreign creditor has goods and wants to prove on estate, English creditor need not.

U.S. bankruptcy has no effect on Canadian realty.

Any creditor may keep payment got out of foreign realty and prove with other creditors innocently on rest. But this is only if English trustees cannot get benefit of proceeds.

CHAPTER XV.

Westlake's Chapter V.—Assignment of Movables by Death.

Foreigner dying, England may grant administration.

Various executors for English and foreign property are exclusive.

Distribution of intestate's personalty is governed by law of his domicile when he died, but immovable are governed by *lex situs.*

But dead man's property is all as if personalty now in Ontario. R. S. O. (1897) c. 127.

Court of domicile if it decides on rights of succession is final, *re* Trufort, L. R. 36 Ch. D 600.

But debts are paid by *lex situs.* After they're paid balance is governed by *lex domicilii.*

Foreign administrator being in jurisdiction, not enough ground for suit. He must have broken the trust before he's liable.

Foreign administrator will generally be given administration power here. Courts of Ontario, however, have discretion.

England distributing foreigner's assets, foreign creditors rank with English creditors, *i.e.*, *lex fori* governs as to (1) collecting assets, (2) then dividing them up, because this is procedure and *lex fori* governs procedure. Milne v. Moore, 24 O. R. 456.

Does a man die intestate? Is his will of movables valid? *Lex domicilii* decides.

Will of movables—validity depends on :—

(1) Testator's capacity.
(2) Will's form.
(3) Substance of will.

In Europe will was valid everywhere if it was valid either (1) in domicile of testator, or (2) in place where made, and testator moving before death and after making the will was immaterial.

England formerly looked only to *lex domicilii* of testator when he died, not after, in all cases.

A died in Paris—domiciled there—law changed after A's death—no effect.

Lord Kingsdown's Act, 24, 5 V. c. 114 governs all BRITISHERS' wills all over Empire, therefore it covers Canada.

(*A*) BRITISHERS—S. 1. Wills made (1) out of United Kingdom—by (2) British subject, as to (3) Personalty are valid if executed by these forms—*i.e.* forms required by

1. *Lex actus.*

2. *Lex domicilii* of testator when will made.

3. *Lex domicilii originis*—but only if it be a British domicile of origin.

Make will good by any one of above, has change of domicile after that any effect? Only this:—It may give another form in addition to above. Never invalidates.

(*a*) Britisher—domicile of origin in Ontario, visits Montreal, there he makes his will and dies, will affects personal property in England. It conveys English property if form complies with law of Quebec, (1 of above) or Ontario (2 and 3 of above).

(*b*) Britisher—domicile of origin in Nova Scotia, taken ill in New York, and makes will there and dies there, it is good in England if by forms of Nova Scotia (3) or New York (1), (there is no 2 unless it be 3). Apart from Lord Kingsdown's Act, will executed according to Law of Testator's Domicile, whether testator be Britisher or not, is valid.

(*c*) Britisher—domicile of origin in Ontario, that of choice in U. S. A., makes will in Italy and there dies. England will probate it if it is good as to form by

Ontario Law = Origin (3).

U. S. A. Law = *domicilii* (2).

Italian Law = *Lex actus* (1.)

S. 2. Wills made in United Kingdom,—*lex loci actus* is good (3 of above is excluded *i.e., domicilii originis*). Must be by British subject—no matter where is his domicile of origin or of choice, governs personalty only.

But if will is made in U. K. according to law of testator's domicile it is good. This section adds to that the *lex loci actus.*

(*d*) Britisher—domicile of origin is Ontario, that of choice is U. S. A. makes will in England and dies —it is good if by U. S. A. law, or English law (not Ontario).

(*e*) American—makes will in England—it does not comply with American law—it does with English law —void because *lex actus* does not govern foreigner.

"Britisher" in this act means one by Naturalization—*Re* Lacroix—2 P. D. 94. Naturalization Act gives *aliens* right to hold English property, they must however be naturalized to come within this act. Bloxam *v* Favre, 9 P. D. 130.

(*B*) ALIENS—Alien law of (1) his domicile, (2) at his death prevails. Alien includes *e.g.*, a British woman who marries a foreigner and resides abroad she becomes an alien.

What is effect of change of testator's domicile after making will ?

S. 3. Before the Act, will had to comply with law of testator's domicile at the testator's death—and therefore such a change voided,—now it does not avoid.

(*b*) Before Act—A, domiciled in France, made will there in accord with French law, went to England, became domiciled and died there. Void in England.

Had A died in England, but domiciled in France, will would have been good in England.

Since Act—wherever A died domiciled it now is good. S. 3. "No will is affected by change of testator's domicile."

Above is as to form. Is it also as to substance?—*e.g.* contrary to Mortmain. It is as to everything—(Westlake) except testator's capacity.

(*C*) CAPACITY—Capacity by Lord Kingsdown's Act is governed by *lex domicilii* of testator at death.

Condition in Restraint of Marriage—

1. Before Act—validity depended on law of testator's last domicile.

2. After Act—validity depends on *lex actus* alone.

By combined effect of ss. 1, 2 and 3, validity of will of British subject *re* form, if will is executed,

(1) *In* United Kingdom, depends on three places
- *lex domicilii* when will was made (Nova Scotia)
- *lex actus*—(England.)
- *lex domicilii* at death (New Jersey).

(2) *Out of* Kingdom, on four places
- *lex actus*—(France.)
- *lex domicilii* when made (Nova Scotia).
- *lex domicilii originis*—(Ontario.)
- *lex domicilii* at death—(New Jersey.)

(*g*) Britisher—*domicilii originis* is Ontario—choice—Nova Scotia—makes will in England—changes choice domicile to New Jersey, and dies, will is good in form, if by law of Nova Scotia, England, New Jersey—not Ontario, because it is excluded (s. 2).

If will were made in France instead of England—in addition there's the domicile of origin. Pechell v Hilderley (L. R. 1 P. & M. 673).

Part of law of one land and part of law of another are worthless.

(*D*) CONSTRUCTION — Construction of will—Since Act—governed by law of testator's domicile at time of making of will—in above case (*g*)—Nova Scotia.

(*E*) POWER—Execution of Power by Will—three persons: Testator, Donee of Power, Object. Donee's capacity is not testamentary capacity—it is just capacity to execute power. Where an instrument is in execution of a power of appointment, (power is given by any instrument, but must be executed by will)—two things govern:

1. It must comply with rules governing the testator, or

2. It must comply with forms required by an English will, *re* Huber (1896) Pr 209.

(*h*) *e.g.* British woman, married Frenchman, and went to live in France, there executed appointment in accordance with English Wills Act—void in France, but good in England.

CHAPTER XVI.

Westlake's Chapter XVII.—Foreign Judgments.

These are recognized in three ways:

1. May be adopted as domestic court's own, and fifa lie on it. (Europe.)

2. May be evidence of new obligation. (England and U.S.)

3. May be evidence of old obligation in domestic suit on old obligation. (Norway and Spain.)

Foreign judgment does not merge original cause,—even simple contract debt. Trevelyan v. Meyers, 26 O. R. 430.

A foreign judgment is a simple contract debt. North v. Fisher, 6 O. R. 206.

Security for costs by foreign litigant will be ordered Crozat v. Brogden (1894) 2 Q. B. 30.

Application to issue writ for service out of jurisdiction where there's a foreign judgment will be refused. Call v. Oppenheim, I. T. L. R. 622.

Foreign judgment is not reviewable for errors in law or fact.

It is for anything showing (1) no legal claim, or (2) excuse for claim,—*e.g.* payment.

(1) It can be shown that foreign Court had no general jurisdiction thus:

(1) Not having any by foreign law.

(2) Defendant not subject to it.

(2) It can't be shown that foreign Court had no special jurisdiction, *e.g.* by its own rules, *e.g.* amount too great or small. *E.g.*, County Court suit abroad,—sum over C. C. limit—Sued in England on that judgment. It is enforceable.

Defences to foreign judgment:—

1. Not final.
2. Fraud getting it.
3. Excess of judicial authority.
4. Want of jurisdiction in foreign court (1 of above.)
5. Want of natural justice.

Foreign court's jurisdiction is presumed—

(1) Foreign judgment must lay on defendant a present duty to pay it. Must be final and conclusive, though subject to appeal,—and even though appeal pending in court where judgment signed,—still suit on it lies in *e.g.* England. In *re* Henderson, Nouvion v. Freeman (15 A. C. 1.)

(2) Plaintiff's fraud, may be set up by defendant,

though it involves a retrial of same question. Vadala v. Lawes, L. R. 25 Q. B. D. 310.

This is denied in Woodruff v. McLennan, 14 A. R. 242, but in case of Hollender v. Ffoulkes, 26 O. R. 61 —the Woodruff case was not followed. Judge may be bribed. Sirdar v. Rajah of Faridkote (1894) A. C. 670.

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Judge may
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